Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BILL PRYOR, ATTORNEY GENERAL FOR THE STATE OF ALABAMA, AND THE STATE OF ALABAMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), violates constitutional principles of federalism.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 171 F.3d 1281. The opinion of the district court (App., *infra*, 17a-51a) is reported at 998 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce * * * among the several States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), is reprinted in an appendix to this petition (App., *infra*, 52a-58a).

STATEMENT

1. This case involves a constitutional challenge brought by the State of Alabama to the Driver's Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which restricts disclosure of personal information from state motor vehicle records.[1] An individual who seeks a driver's

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[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no

license from his State's department of motor vehicles (DMV) is generally required to give the state DMV a range of personal information, including his name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the motor vehicle department also requires a driver to provide his social security number (SSN) and takes a photograph of the driver. State DMVs, in turn, often sell this personal information to other individuals and businesses.[2] Although DMVs generally charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used the State's computers to examine driver's license records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union). The

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longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on WESTLAW. See *Protecting Driver Privacy: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994); see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

Wisconsin Department of Transportation receives about $8 million each year from its sale of motor vehicle information. See *Travis* v. *Reno*, 163 F.3d 1000, 1002 (7th Cir. 1998), petition for cert. pending, No. 98-1818.

The personal information sold by DMVs is also used extensively to support the marketing efforts of corporations and database compilers. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). This information "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University) (describing use of DMV information by direct marketers).

The highly publicized 1989 murder of actress Rebecca Schaeffer brought to light the potential threat to privacy and safety posed by this commerce in motor vehicle record information. Schaeffer had taken pains to ensure that her address and phone number were not publicly listed. Despite those precautions, a stalker was able to obtain her home address through her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Evidence gathered by Congress revealed that the incident involving Rebecca Schaeffer was similar to many other crimes in which stalkers, robbers, and assailants had

used state motor vehicle records to locate, threaten, and harm victims.[3]

Moreover, Congress received evidence indicating that a national solution was warranted to address the problem of potentially dangerous disclosures of personal information in motor vehicle records. Marshall Rickert, Motor Vehicle Administrator for the State of Maryland, who testified in support of the legislation on behalf of the American Association of Motor Vehicle Administrators, emphasized that technological advances had dramatically increased the accessibility of state motor vehicle records, but that "many state laws have not kept pace with technological advancements, and permit virtually unlimited public access to driver and motor vehicle records." 1994 WL 212696 (Feb. 4, 1994). Accordingly, he urged that "uniform national standards are needed." *Ibid.* In addition, among the incidents brought to Congress's attention were ones in which stalkers had followed their victims across state lines. See 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty).

2. Based on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records, Congress enacted the DPPA to restrict the disclosure of personal information in such records without the consent of the individual to whom the information pertains. The DPPA prohibits any state DMV, or officer or employee thereof, from

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[3] See, *e.g.*, 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

"knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a).[4] The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3).

The DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to opt out from disclosure when they receive or renew their licenses. See 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information about an individual to a requester if the DMV obtains consent to the disclosure from the individual to whom the information pertains. See 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

The DPPA explicitly disclaims any restriction on the use of motor vehicle information by "any government agency," including a court, and also "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). It also expressly permits DMVs to disclose

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[4] A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

personal information for any state-authorized purpose "relat[ing] to the operation of a motor vehicle or public safety." 18 U.S.C. 2721(b)(14).

The DPPA does not preclude States from disclosing personal information for other uses in which Congress found an important public interest. Thus, States may disclose personal information in their motor vehicle records for use in connection with car safety or theft, driver safety, and other motor-vehicle related matters, 18 U.S.C. 2721(b)(2); by a business to verify the accuracy of personal information submitted to that business, and further to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9) (1994 & Supp. III 1997); for use in connection with private tollways, 18 U.S.C. 2721(b)(10); and in certain circumstances for bulk distribution for surveys, marketing, or solicitation, if individuals are provided an opportunity, "in a clear and conspicuous manner," to prohibit such use of information pertaining to them, 18 U.S.C. 2721(b)(12)(A).

The DPPA also regulates, as a matter of federal law, the resale and redisclosure of personal information

obtained from state DMVs, 18 U.S.C. 2721(c) (1994 & Supp. III 1997), and prohibits any person from knowingly obtaining or disclosing any record for a use not permitted by the DPPA, 18 U.S.C. 2722(a), or providing false information to a state agency to circumvent the DPPA's restrictions on disclosure, 18 U.S.C. 2722(b).

The DPPA sets forth penalties and civil remedies for knowing violations of the Act. Any "person" (defined to exclude any State or state agency) who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may also be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724(a). The States, however, have no obligation themselves to regulate the private use of information obtained under the Act or to pursue legal remedies against any requester who obtains or uses information in violation of the Act.

3. Alabama law provides that "[e]very citizen has a right to inspect and make a copy of any public writing of this state, except as otherwise expressly provided by statute." Ala. Code § 36-12-40 (1975). Respondents, an officer and an agency of the State of Alabama, filed suit in federal district court, alleging that the DPPA is not a valid exercise of Congress's Commerce Clause powers, and that the statute violates the Tenth Amendment. Respondents sought to enjoin enforcement of the Act.

The district court granted summary judgment for the federal government. App., *infra*, 17a-51a. The court held first that the DPPA is a valid exercise of Congress's power to regulate commerce. *Id.* at 32a-34a. It rejected the State's contention that the Commerce Clause inquiry should turn on whether Alabama made a profit on its sales of motor vehicle information. The court explained that evidence before Congress showed that, "once released, personal DMV information is often used in direct marketing campaigns or resold by database-compiling companies to other companies for use in direct-marketing campaigns," *id.* at 33a, and that direct marketing is a national industry, *ibid.* Thus, the court observed, Congress had a rational basis for concluding that the disclosure of such information "substantially impacts the national trade of DMV records." *Id.* at 33a-34a.

The court also rejected (App., *infra*, 40a) respondents' claim that the DPPA contravenes the Tenth Amendment, as construed by this Court in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). Rather, the court concluded, the DPPA is analogous to the statute found constitutional in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which upheld a federal statute that effectively required the States to issue registered bonds, rather than bearer bonds. App., *infra*, 40a-41a. The court noted that the DPPA, "like the statue at issue in *South Carolina* v. *Baker*, is one which directly regulates the states, rather than requires the states to administer or enforce a federal regulation. This distinguishes the DPPA from the provisions at issue in *New York* and *Printz*—both of which the Court found required States to regulate certain activity according to the instruction of Congress." App., *infra*, 42a.

4. The court of appeals reversed. App., *infra*, 1a-16a. Although the court questioned (*id.* at 6a-7a) whether the DPPA falls within Congress's commerce powers, it did not resolve that issue. Rather, it held that the Act violates the Tenth Amendment. *Id.* at 7a-16a.

The court acknowledged that "the DPPA does not compel Alabama to enact legislation as in *New York*; nor does it conscript state officers to help the federal government search for potential violations of federal law as in *Printz*." App., *infra*, 9a. The court nonetheless found it significant that the DPPA "does establish a detailed set of rules under which Alabama's disclosure or refusal to disclose to third parties the personal information in its motor vehicle records shall be done as the federal establishment wishes it to be done." *Ibid.* Further, the court reasoned, "[s]tate officers are *directed* to administer and enforce those rules. * * * In complying with the Act, state officers must review requests for information to determine whether the request is for a permissible use." *Id.* at 10a. And because the Act "contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information[, in] reviewing requests and interpreting the rules, state officers will be acting as federal agents making federal policy." *Ibid.*

The court also acknowledged that, under *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, *supra*, "Congress may require the States to comply with federal regulation of an activity affecting interstate commerce when the States choose to engage in that activity." App., *infra*, 11a. The court held, however, that the

DPPA cannot be upheld under those decisions because the Act is not a law of "general applicability" like the statutes upheld in *Garcia* and *Baker*; rather, the DPPA is "targeted exclusively at States." *Ibid.* "Only States collect driver's license and motor vehicle information. This is an exercise of sovereignty," and therefore, the court concluded, shielded by the Tenth Amendment from Congress's power to regulate. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The question presented in this petition is the same as the question presented in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999). Accordingly, the petition in this case should be held pending the Court's decision in *Condon*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JULY 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6261
D.C. Docket No. CV-98-D-1396-N

BILL PRYOR, ATTORNEY GENERAL FOR THE STATE OF ALABAMA, STATE OF ALABAMA,
PLAINTIFFS-APPELLANTS

versus

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Middle District of Alabama

[Filed: April 6, 1999]

Before: TJOFLAT, Circuit Judge, and GODBOLD and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs, Bill Pryor, Attorney General for the State of Alabama, and the State of Alabama (referred to collectively as Alabama or "the State"), sought a declaratory judgment that the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25, is unconstitutional under

both the Tenth and Eleventh Amendments to the United States Constitution, and an injunction prohibiting the defendants Janet Reno and the United States from enforcing the Act in whole or in part. The district court entered summary judgment for the United States, from which Alabama appeals.

I.

The Driver's Privacy and Protection Act of 1994 ("DPPA" or "the Act"), 18 U.S.C. §§ 2721, et seq., regulates the sale, dissemination and use by the State and private individuals of personal information[1] contained in the State's motor vehicle records.[2] The Act prohibits "a State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). It makes it unlawful for a State department of motor vehicles [DMV], and any officer, employee, or contractor thereof, to knowingly disclose or otherwise make available personal DMV information for any purpose

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[1] Section 2725(3) of the Act defines personal information as:

> information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accident, driving violations, and driver's status.

[2] Section 2725(1) of the Act defines a "motor vehicle record" as:

> any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.

other than a "permissible use." 18 U.S.C. § 2721(b). State departments of motor vehicles with a "policy or practice of substantial noncompliance" with the Act's provisions are subject to a civil penalty of up to $5,000 a day for each day of substantial noncompliance, to be imposed by the United States Attorney General. 18 U.S.C. § 2723(b). Persons who knowingly violate the Act are subject to criminal fines. 18 U.S.C. § 2723(a).

Reversing course, the Act then allows disclosure of personal information in abundant circumstances. 18 U.S.C. § 2721(b). For example, the Act *requires* that such information be disclosed for use in matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act, the Clean Air Act, and chapters 301, 305, and 321-331 of title 49. 18 U.S.C. § 2721(b) (citations omitted). It further provides that personal information *may* be disclosed for use by any government agency in carrying out its functions, *id.* § 2721(b)(1); in connection with car or driver safety, theft and other motor-vehicle related matters, *id.* § 2721(b)(2); for use in the normal course of business by a legitimate business in certain instances, *id.* 2721(b)(3); for use in connection with any civil, criminal, administrative or arbitral proceedings in any Federal, State, or local court or agency or before any self-regulatory body, *id.* § 2721(b)(4); for use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redis-

closed, or used to contact individuals, *id.* § 2721(b)(5); for use by an insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, anti-fraud activities, rating or underwriting, *id.* § 2721(b)(6); for use in providing notice to owners of towed or impounded vehicles, *id.* § 2721(b)(7); for use by a licensed private investigative agency or licensed security service for any purpose permitted under the Act, *id.* § 2721(b)(8); for use by an employer or its agent or insurer to obtain or verify required information relating to a holder of a commercial driver's license, *id.* § 27221(b)(9); and for use in connection with the operation of private toll transportation facilities, *id.* § 2721(b)(10).

The DPPA also regulates private individuals' sale or disclosure of the above information. The Act prohibits authorized recipients of personal DMV information from reselling or redisclosing personal information for a use which the State could not have disclosed it in the first place. 18 U.S.C. § 2721(c); 18 U.S.C. § 2722(a). The Act requires that individuals reselling or redisclosing personal information for a permissible use keep records for five years stating to whom they have resold or redisclosed the information and the purpose of any such release, and must make these records available to the state department of motor vehicles upon request. 18 U.S.C. § 2721(c). The Act also bars any person from knowingly obtaining personal DMV information for any unauthorized use, 18 U.S.C. § 2722(a), and from obtaining personal information "by false representation," 18 U.S.C. § 2722(b). Individuals who knowingly violate these provisions are subject to criminal fines, 18 U.S.C. § 2723(a), and private rights of action by the person to

whom the personal information pertains. 18 U.S.C. § 2724.

In addition to the exceptions noted above, the Act allows States to establish waiver procedures to handle requests for disclosures that do not fall within these exceptions. 18 U.S.C. § 2721(d). The DPPA allows States to release personal information for any use not included in the Act's list of permissible uses, if the motor vehicle department provides individuals an opportunity to prohibit such disclosure. 18 U.S.C. § 2721(b)(11). Also, departments of motor vehicles are permitted to release personal information for "bulk distribution" for surveys, marketing or solicitations if individuals have an opportunity to prohibit such disclosures. 18 U.S.C. § 2721(b)(12).

Alabama contends that Congress exceeded its authority under the Tenth and Eleventh Amendments when it enacted the DPPA. The State contends that the DPPA is an unconstitutional federal directive requiring it to administer a federal program in violation of the Tenth Amendment. The State further contends that the penalties imposed by the Act for noncompliance violate the Eleventh Amendment. The United States counters that the Act is a constitutional exercise of Congress' power under the Commerce Clause of the United States Constitution to regulate and control the dissemination of personal information in state DMV records in order to protect the privacy and safety of individuals. On cross-motions for summary judgment,[3] the district court held that the Act is a valid exercise of

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[3] The United States' motion was for dismissal which the district court construed as a motion for summary judgment pursuant to Rule 12(b), Fed.R.Civ.P.

Congress' authority to regulate interstate commerce, and that it violates neither the Tenth nor the Eleventh Amendment. Alabama appeals from the entry of this judgment.

II.

Alabama asserts that the DPPA violates the Tenth Amendment in two ways. First, Alabama contends that the Commerce Clause does not authorize Congress to invade the Tenth Amendment by regulating the States' dissemination of motor vehicle information. Second, Alabama contends that the Tenth Amendment prohibits Congress from requiring it to administer a federal program.

A. *Congress' Authority to Enact the DPPA*

Alabama argues that Congress exceeded its authority in regulating the States' release of motor vehicle information because the dissemination of this information is neither commerce, nor an activity substantially affecting commerce. Although it is abundantly clear that trafficking in data bases is an activity that substantially affects interstate commerce these days, we are, nonetheless, sympathetic to this argument. Congress drew its authority to regulate this activity from its nexus to interstate commerce, and then proceeded to exempt from the reach of the Act virtually all its interstate connections.

It is clear that Congress sought by this Act to protect the public from "stalkers" who might use motor vehicle information to locate their victims.[4] In trying to protect

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[4] During floor debate on the Senate version of the Act, Senators invoked the example of Rebecca Shaeffer, an actress from California, who was murdered by an obsessed fan who obtained

legitimate governmental and business uses of such information, however, Congress riddled the Act with more holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act. Thus, Congress claims its authority to regulate the States' dissemination of personal DMV information lies in its power to regulate the commercial aspect of this information which it then proceeded to exclude from the Act.

We shall not resolve this troublesome issue, however, because we are persuaded that even if there is a sufficient connection between this legislation and interstate commerce to authorize Congress to enact the DPPA, the Act violates the Tenth Amendment.

B. *The DPPA and the Tenth Amendment*

The Supreme Court has recently made clear that the federal government may not command the States to administer or enforce a federal regulatory program. *Printz v. United States*, 521 U.S. 98, 117 S. Ct. 2365, 2384 (1997); *New York v. United States*, 505 U.S. 144, 176-77, 112 S. Ct. 2408 (1992). In *New York*, the Supreme Court addressed the constitutionality of the Low-Level Radioactive Waste Policy Act which required States to choose between accepting ownership of radioactive waste generated within their borders and regulating this waste according to instructions from Congress. 505 U.S. at 152. The Court found that this

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her address from the department of motor vehicles through a private investigator. *See* 139 Cong. Rec. S15,766, Comments of Senator Harkin. *See also* (Feb. 4, 1994) (statement of Rep. Moran): 139 Cong. Rec. S15,762 (Nov. 16, 1993) (statement of Sen. Boxer); 139 Cong. Rec. S15,765 (Nov. 16, 1993) (statement of Sen. Robb); 139 Cong. Rec. S15,765 (statement of Sen. Biden).

provision "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," in violation of the Tenth Amendment. *Id.* at 176. In *Printz*, the Court extended the holding of *New York* to recognize that the Tenth Amendment protects state officers, as well as States, from federal commandeering. In *Printz*, the Court held unconstitutional provisions of the Brady Handgun Violence Prevention Act which imposed interim requirements on State chief law enforcement officers ("CLEOs") to conduct background checks on prospective handgun purchasers and to perform related tasks. 117 S. Ct. at 2368. The Act required CLEOs to:

> make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a firearm by a particular purchaser] would be in violation of the law, including research in whatever state and local record keeping systems are available.

Id. at 2369 (quoting 18 U.S.C. § 922(s)(2)). The Court characterized this provision as one directing or forcing state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. *Id.* at 2369, 2376. The Court held the requirement violated the Tenth Amendment because:

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of burdens or benefits is necessary; such commands are fundamentally

> incompatible with our constitutional system of dual sovereignty.

Id. at 2384.

Although *New York* and *Printz* make clear that federal law may not direct state officials to administer or enforce a federal regulatory scheme, they are less helpful in identifying the attributes of such a law. We recognize that the DPPA does not compel Alabama to enact legislation as in *New York*; nor does it conscript state officers to help the federal government search for potential violations of federal law as in *Printz*.

Nevertheless, the DPPA does establish a detailed set of rules under which Alabama's disclosure or refusal to disclose to third parties the personal information in its motor vehicle records shall be done as the federal establishment wishes it to be done. The Act *requires* that department of motor vehicle officers disclose personal information contained in its motor vehicle records for use in connection with matters of motor vehicle or driver safety and theft and to carry out various federal statutes.[5] It further provides that personal information *may* be disclosed in fourteen other circumstances. It seeks to regulate the circumstances under which private individuals may obtain this information and to prevent the disclosure at all in certain instances. No one disputes that Congress, through the DPPA, has enacted a federal regulatory program to control the dissemination and cloaking of the States' motor vehicle information.

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[5] This requirement nullifies the United States' argument that the Act does not command the States to do anything because the States may simply opt out of this legislation by deciding to close their DMV records completely.

Furthermore, the Act is neither self-administering nor self-enforcing. State officers are *directed* to administer and enforce these rules. They must insure that protected information is disclosed only for the designated purposes specified by the federal rules. In complying with the Act, state officers must review requests for information to determine whether the request is for a permissible use. The Act contains no explicit instructions regarding the extent to which the state officer must investigate and confirm the accuracy of the claims made by individuals requesting the information. In reviewing requests and interpreting the rules, state officers will be acting as federal agents making federal policy. *See Printz*, 117 S. Ct. at 2380-81.

Thus, we conclude the DPPA is a federal regulatory program which Congress has directed state officers to administer. Congress may not enlist state officers in this way. *Printz*, 117 S. Ct. at 2380. As the Court stated in *New York*:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

505 U.S. at 188.

The United States argues that it is permissible for Congress to command state officers to assist in the implementation of federal law so long as Congress itself devises a clear legislative program that regulates the States directly rather than requiring them to regulate third parties. The DPPA, it is said, is constitutional because it directly regulates state activities and neither

directs the States or their officials to regulate their citizens, nor to construct any regulatory regime.

We disagree. To be sure, Congress may require the States to comply with federal regulation of an activity affecting interstate commerce when the States choose to engage in that activity.[6] Thus, the States as employers must comply with the federal minimum wage law. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See also South Carolina v. Baker*, 485 U.S. 505, 511-15 (1988) (States may be required to issue bonds in registered form as are private corporations); *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678 (1982) (labor laws apply to state-owned railroads); *Fry v. United States*, 421 U.S. 542 (1975) (States are bound by generally applicable wage and price controls).

But all of these cases are examples of when a particularly strong federal interest permits Congress to bring state governments within the orbit of generally applicable federal regulation. *Garcia*, 469 U.S. at 554 ("San Antonio faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet"). In *Printz* and *New York*, the Supreme Court distinguished such laws of general applicability from laws targeted exclusively at States. 117 S. Ct. at 2383; 505 U.S. at 160. Although the Tenth Amendment

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[6] In fact, Congress may totally occupy a field of regulation of interstate commerce but permit continued state regulation of the activity so long as a State meets certain preconditions. The DPPA does not, however, preempt the field of licensing drivers. Nor does it impose preconditions to the States' continued regulation of a totally preempted field. It seeks only to direct the States in that regulation.

does not automatically permit the former and proscribe the latter, in the cases cited above the issue was whether the incidental application to the States of federal laws of general applicability excessively interfered with the functioning of state governments. The federal laws at issue were upheld because the federal interest was strong enough to permit Congress to bring state governments within the orbit of generally applicable federal regulation.

The Court has made clear, however, that where, as here, the "whole object of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate." 117 S. Ct. at 2383. *See also New York*, 505 U.S. at 160 (radioactive waste statute unconstitutional because the "[take title] provision is inconsistent with the federal structure of our Government established by the Constitution"). Instead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of the States' own property—the motor vehicle records. "It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect." *Printz*, 117 S. Ct. at 2383.[7]

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[7] The United States suggests that the DPPA is generally applicable when considered in the context of other federal laws which regulate the dissemination of personal information, such as the Video Privacy Protection Act, 18 U.S.C. § 2710 (restricting disclosure of personal information contained in video rental records) and the Cable Communications Policy Act, 47 U.S.C. § 551 (restricting disclosure of personal information about cable subscribers). Even if a statute could be considered generally applicable because it is part of some sort of scheme of regulation,

It is not state power that the principle of state sovereignty protects. When States are forced to administer federal programs, a fundamental attribute of State sovereignty is threatened: democratic accountability. It is this basic principle upon which the Supreme Court rested its holdings in *New York* and *Printz*:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

117 S. Ct. 2365. The Court also observed in *New York*:

Congress has thus far regulated the disclosure of personal information by holders of databases only in a piecemeal fashion. There is no generally applicable Congressional regulation of the disclosure of such information even if all such laws are considered part of such a scheme. Thus, there is no generally applicable Congressional regulation of this activity of which the DPPA is a part.

> But where the Federal Government directs the States to regulate, it may be state officials who will be the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

505 U.S. at 169 (citations omitted). Thus, when Congress requires the States to administer a federal program, democratic accountability is diminished and for this reason the Tenth Amendment is offended.

This Act cannot be saved by the argument that it simply regulates a realm of national economic activity—the buying and selling of personal information—whether or not the economic actors happen to be State or citizens.[8] The DPPA is not a law

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[8] A similar argument was made in *Printz* that the burden on officers of the state would be permissible if a similar burden were also imposed on private parties with access to relevant data. The Court rejected this argument by noting:

> The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigations in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

117 S. Ct. at 2383.

of general applicability.[9] Only States collect driver's license and motor vehicle information. This is an exercise of sovereignty. *See Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment"); *United States v. Best*, 573 F.2d 1095, 1103 (9th Cir. 1978) ("[T]here is little question that the licensing of drivers constitutes 'an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens'").

Thus, we conclude that the DPPA is a federal program which Congress has commanded the States to administer. As such, it offends the Tenth Amendment.[10] *Accord Condon v. Reno*, 155 F.3d 453 (4th Cir.

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[9] Although the Act restricts the way in which private parties who obtain personal information from a motor vehicle department may resell or redisclose such information, the Act's applicability to private parties is incidental to its foremost purpose: regulating the way in which state disseminate information collected by their motor vehicle divisions.

[10] We find no merit in the United States' contention that the Act is a valid exercise of Congress' power to enforce the Fourteenth Amendment. U.S. Const. amend. XIV, §§ 1, 5. Whether Congress properly exercised its power under Section 5 in enacting the DPPA depends upon whether the Act enforces some right guaranteed by the Fourteenth Amendment. According to the United States, we have held that there is a "right to confidentiality" in the sort of personal information protected by the DPPA. We disagree. For example, in one of the cases cited by the United States, *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir. 1991), we acknowledged a constitutional right to privacy only for *intimate personal information given to a state official in confidence*. Because information contained in motor vehicle records is

1998). *But see Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998).

III.

The judgment of the district court is hereby REVERSED, and the case is REMANDED. The district court shall grant Alabama's motion for an injunction against the enforcement of the DPPA.

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not this sort of information, an individual does not have a reasonable expectation that the information is confidential. Thus, there is no constitutional right to privacy in motor vehicle record information which the DPPA enforces.

We do not reach the Eleventh Amendment issue involving the constitutionality of the fines provided for by the DPPA because we hold the Act unconstitutional under the Tenth Amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 97-D-1396-N

BILL PRYOR, ATTORNEY GENERAL
FOR THE STATE OF ALABAMA,
AND THE STATE OF ALABAMA, PLAINTIFFS

v.

JANET RENO, ATTORNEY GENERAL OF THE
UNITED STATES, AND THE UNITED STATES OF
AMERICA, DEFENDANTS

[Filed: Mar. 13, 1998]

MEMORANDUM OPINION AND ORDER

On September 18, 1997, Plaintiffs Bill Pryor, Attorney General for the State of Alabama, and the State of Alabama (referred to collectively as "Plaintiffs," "Alabama" and "the State") filed this action, seeking (1) a declaratory judgment that the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25, is unconstitutional under the Tenth and Eleventh Amendments to the United States Constitution, and (2) a preliminary and permanent injunction prohibiting Defendants Janet Reno and the United States (referred to collectively as "Defendants" and "the United States") from enforcing

the Act in whole or in part.[1] Plaintiffs filed a Motion for Summary Judgment on December 22, 1997. Defendants filed a Motion to Dismiss on January 5, 1998, which, pursuant to Fed. R. Civ. P. 12(b), the court construes as a Motion for Summary Judgment, as well.[2]

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[1] On December 17, 1997, Plaintiffs filed an Amended Complaint and Motion for Preliminary Injunction.

[2] Rule 12(b) states that, if, on a motion to dismiss for failure to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

Defendants filed a Memorandum in Support of Motion to Dismiss and Opposition to Plaintiff's Motion for Summary Judgment on January 5, 1998, wherein Defendants included citations to excerpts of Congressional testimony. Plaintiffs filed a Response to Defendants' Motion to Dismiss on January 20, 1998. Defendants filed a Reply to Plaintiffs' Response on January 27, 1998. Further, Plaintiffs filed a Brief in Support of their Motion for Summary Judgment on December 23, 1997, to which Defendants' January 5, 1998 Memorandum also replied. As Plaintiffs' own Motion for Summary Judgment refutes the contentions asserted in Defendants' Motion to Dismiss, the court finds that Plaintiffs have had a "reasonable opportunity" to present all material pertinent to Defendants' Motion to construe it as a Motion for Summary Judgment. Fed. R. Civ. P. 12(b).

In addition, Defendants filed an Opposition to Plaintiffs' Motion for a Preliminary Injunction on January 5, 1998. On December 19, 1997, the court entered an Order setting a hearing on Plaintiffs' Motion for Preliminary Injunction for February 13, 1998. The court further Ordered a briefing schedule on Plaintiffs' Motion. Plaintiffs filed a Brief in Support of Plaintiffs' Motion for a Preliminary Injunction on January 20, 1998. Defendants filed a Response to Issues Raised in Plaintiffs' Reply in Support of Motion for Preliminary Injunction on January 27, 1998. On February 9, 1998, the court, having been fully briefed on the matters pending in

After careful consideration of the arguments of counsel, the relevant law and the record as a whole, the court finds that Plaintiffs' Motion for Summary Judgment is due to be denied, and Defendants' Motion for Summary Judgment is due to be granted. Accordingly, Plaintiffs' Motion for Preliminary Injunction is due to be denied as moot. This Memorandum Opinion and Order disposes of all matters before the court.[3]

BACKGROUND

The Driver's Privacy and Protection Act of 1994 ("DPPA" or "the Act"), 18 U.S.C. §§ 2721, *et seq.*, regulates the sale, dissemination and use by the State and private individuals of personal information contained in State motor vehicle records.[4] The Act prohibits "a

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Plaintiffs' Motion for Preliminary Injunction, entered an Order canceling the Hearing set for February 13, 1998.

[3] The elements of a permanent injunction and a preliminary injunction are similar, the sole exception being that the movant must actually prevail, as opposed to showing a likelihood of success on the merits, in order to receive a permanent injunction. *See e.g., Statewide Detective Agency v. Miller*, 115 F.3d 904, 905 (11th Cir. 1997); *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983). Having been extensively briefed on the merits of all relevant issues, the court properly resolves the merits of this action.

[4] The statute defines a "motor vehicle record" as:

> any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles.

18 U.S.C. § 2725(1).

The DPPA defines "personal information" as:

> information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability informa-

State department of motor vehicles, and any officer, employee, or contractor, thereof, [from] knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a). It makes it unlawful for a State department of motor vehicles, and any officer, employee, or contractor thereof, to knowingly disclose or otherwise make available personal DMV information for any purpose other than a "permissible use." 18 U.S.C. § 2721(b).[5] State departments of motor

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tion, but does not include information on vehicular accidents, driving violations, and driver's status.

18 U.S.C. § 2725(3).

[5] The Act allows for the disclosure of personal information in abundant circumstances. 18 U.S.C. § 2721(b). For example, such information may be disclosed for use by any government agency in carrying out its functions, *id.* § 2721(b)(1); in connection with car or driver safety, theft and other motor-vehicle related matters, *id.* § 2721(b)(2); for use in the normal course of business by a legitimate business in certain instances, *id.* § 2721(b)(3); for use in connection with any civil, criminal, administrative or arbitral proceedings in any Federal, State, or local court or agency or before any self- regulatory body, *id.* § 2721(b)(4); for use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals, *id.* § 2721(b)(5); for use by an insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting, *id.* § 2721(b)(6); for use in providing notice to owners of towed or impounded vehicles, *id.* § 2721(b)(7); for use by any licensed private investigative agency or licensed security service for any purpose permitted under the Act, *id.* § 2721(b)(8); for use by an employer or its agent or insurer to obtain or verify required information relating to a holder of a commercial driver's license, *id.*

vehicles with a "policy or practice of substantial noncompliance" with the Act's provisions are subject to a civil penalty of up to $5,000 a day for each day of substantial noncompliance, to be imposed by the United States Attorney General. 18 U.S.C. § 2723(b). Persons who knowingly violate the Act are subject to criminal fines. 18 U.S.C. § 2723(a).

The DPPA also regulates private individuals' sale or disclosure of the above information. The Act prohibits authorized recipients of personal DMV information from reselling or redisclosing personal information for a use for which the state could not have disclosed it in the first place. 18 U.S.C. § 2721(c); 18 U.S.C. § 2722(a). The Act requires that individuals reselling or redisclosing personal information for a permissible use keep records for five years stating to whom they have resold or redisclosed the information and the purpose of any such release, and must make these records available to the state department of motor vehicles upon request. 18 U.S.C. § 2721(c). Furthermore, the Act bars any person from knowingly obtaining personal DMV information for any unauthorized use, 18 U.S.C. § 2722(a), and from obtaining personal information "by false representation," 18 U.S.C. § 2722(b). Individuals who knowingly violate these provisions are subject to criminal fines, 18 U.S.C. § 2723(a), and private rights of action by the person to whom the personal information pertains. 18 U.S.C. § 2724.

The Act does permit disclosure or use of personal DMV information in several contexts, 18 U.S.C. § 2721(b)(1)-(14), and allows states to establish waiver

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§ 2721(b)(9); and for use in connection with the operation of private toll transportation facilities, *id.* § 2721(b)(10).

procedures to handle requests for disclosures that do not fall within these exceptions. 18 U.S.C. § 2721(d). The DPPA allows states to release personal information for any use not included in the Act's list of permissible uses, if the motor vehicle department provides individuals an opportunity to prohibit such disclosure. 18 U.S.C. § 2721(b)(11). Also, departments of motor vehicles are permitted to release personal information for "bulk distribution" for surveys, marketing or solicitations if individuals have an opportunity to prohibit such disclosures. 18 U.S.C. § 2721(b)(12).

According to Defendants, Congress's purpose in enacting the DPPA was two-fold. First, Congress enacted the DPPA as a means of regulating the sale of personal DMV records for use in direct marketing, as numerous states sell or give personal information to data-base compilers, who use it in compiling targeted mailing lists sold or rented to direct marketers and individual companies to target customers nationwide. (Defs.' Mem. in Supp. Mot. to Dis. and in Opp. to Pls.' Mot. for Summ. J. ("Defs.' Mem. in Supp.") at 3-4.) As Defendants note, in considering the Act, Congress heard testimony on the way in which motor vehicle information is used in direct marketing. *See* 1994 WL 212834, Statement of Mary J. Culnan.

As Defendants assert, Congress also sought to regulate the disclosure and dissemination of personal DMV records in order to protect the privacy and safety of individuals. (Defs.' Mem. in Supp. at 4-5.) For example, as Defendants note, during testimony on the DPPA, Congress learned that, nationwide, criminals have used motor vehicle records to locate victims and commit crimes, as private citizens' addresses and phone numbers are easily accessible through such records. (Defs.'

Mem. in Supp. at 4-5.)[6] During floor debate on the Senate version of the Act, Senators invoked the example of Rebecca Shaeffer, an actress from California, who was murdered by an obsessed fan who obtained her address from the department of motor vehicles through a private investigator. *See* 139 Cong. Rec. S15766, Comments of Senator Harkin.

Alabama contends that, in enacting the DPPA, Congress has exceeded its authority under the Tenth and Eleventh Amendments. Specifically, the State contends that the DPPA is an unconstitutional federal directive requiring the State of Alabama, through its state executive officers and legislature, to administer a federal program, which infringes on the State's sovereign right to legislate and regulate its citizens, in violation of the Tenth Amendment. The State further contends that the penalties imposed by the Act for noncompliance violate the Eleventh Amendment. Defendants challenge Plaintiffs' standing to bring this suit, and assert that the DPPA passes constitutional muster.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled

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[6] Citing 1994 WL 14167988 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 14168013 (Feb. 3, 1994) (statement of David Beatty); 1994 WL 14168055 (Feb. 3, 1994) (statement of Donald H. Cahill); 139 Cong. Rec. S15,762 (Nov. 16, 1993) (statement of Sen. Boxer); 139 Cong. Rec. S15,765 (Nov. 16. 1993) (statement of Sen. Robb); 139 Cong. Rec. S15,765 (statement of Sen. Biden).

to judgment as a matter of law." Fed. R. Civ. P. 56(c). As the Supreme Court has explained the summary judgment standard:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving

party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e).

In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita*, 475 U.S. at 587; *see also Anderson*, 477 U.S. at 249.

DISCUSSION

I. *STANDING*

Article III of the Constitution restricts the jurisdiction of the federal courts only to those disputes in which there is an actual "case" or "controversy." *See Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). An essential element of the case-or-controversy requirement is that Plaintiffs have standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984).

To have standing, the plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the

requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). The alleged injury must be "distinct and palpable," and not "abstract," "conjectural," or "hypothetical." *Allen*, 468 U.S. at 751 (citations omitted).

In a case such as this, where the court is asked to determine the constitutionality of legislation, the court's standing inquiry is especially rigorous. *Raines*, 117 S. Ct. at 2317. Thus, before considering the merits of the case, and before considering Plaintiff's request to issue a preliminary injunction, the court must determine whether Plaintiffs have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable. *Raines*, 117 S. Ct. at 2317. Plaintiffs must at least establish that they have suffered an injury in fact—namely an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

Plaintiffs assert two grounds on which the court may find it has standing to bring the instant action. First, Plaintiffs contend that the State has standing to protect the "continued enforceablility of its own statutes." (Pls.' Br. in Supp. of Mot. for Summ. J. at 5.) Specifically, Plaintiffs contend that the DPPA conflicts with the State's present disclosure laws, namely Alabama Code §§ 32-6-14, 32-7-4 and 36-12-40.

Alabama Code § 36-12-40, the "Open Records Act," states, in relevant part:

> Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

Ala. Code § 36-12-40 (1975). Plaintiffs contend that "[f]or Alabama Department of Motor Vehicle officials to comply with the DPPA, they must violate the letter and spirit of the Alabama 'Open Records Act' which requires public writings be made available to the public." (Pls.' Br. in Supp. of Mot. for Summ. J. at 5.)

Defendants contend that the DPPA does not, in fact, conflict with the Open Records Act, as Alabama courts have repeatedly recognized that the provision does not demand disclosures that will "result in undue harm or embarrassment to an individual or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure." (Defs.' Mem. in Supp. at 11) (quoting *Chambers v. Birmingham News Co.*, 552 So.2d 854, 856 (Ala. 1989).) Plaintiffs contend, and the court finds, that no Alabama court has deemed the information contained in the DMV records to be an exception to the Open Records Act. Accordingly, the court finds that Plaintiffs have established standing on this basis. *See Oklahoma v. United States*, No. 97-1423, at 4 (W.D. Okl. Sept. 17, 1997) (finding that Plaintiff established standing based on the DPPA's conflict with the Oklahoma Open Records Act).

In addition and in the alternative, the court finds that the State has shown that the DPPA imposes "substantial costs" on the State minimally sufficient to establish its standing to bring suit. Plaintiffs contend that "[f]ollowing the DPPA's restrictive disclosure guidelines requires development of a new regulatory scheme and the training of DMV staff in its effect and

operation," resulting in the State incurring "substantial, tangible costs." (Pls.' Brief in Supp of Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dismiss at 3.) In support of this contention, Plaintiffs offer the Affidavit of L.N. Hagan, the Director of the Alabama Department of Public Safety, stating, in relevant part:

> 2. The DPPA would impose substantial cost and labor on the Department of Public Safety if compliance with the Act is required.
>
> * * * *
>
> 6. The implementation of DPPA would require the expense of training personnel about what information may be released, to whom and for what purpose. We would also need to retain personnel about the opt-out provisions for license renewals and new licenses.
> 7. Since the DPPA carries both criminal and civil penalties for personnel who release information on drivers licenses, training would have to be thorough and detailed. My staff estimates the cost of training to be $16,520.
> 8. There is no question, if DPPA is fully implemented by the State of Alabama, the Act will impose substantial expense and labor on the officers and employees of the Department of Public Safety.

(Pls.' Amend. Compl., Ex. A., Hagan Aff. ("Hagan Aff.").)

Based on this Affidavit, the court finds that the State has shown that it will suffer the incursion of costs *minimally* sufficient to establish standing to bring this suit. *See Condon v. Reno*, 972 F.Supp. 977, 981 n. 12 (D.S.C. 1997) (finding that evidence contained in the

"unrebutted affidavit" of a Department of Motor Vehicles official that implementation of the DPPA would "impose substantial costs and effort on the part of the Department in order for it to achieve compliance" meets the requirements for standing).

Accordingly, the court finds that the State has standing to bring the instant suit.

II. *Tenth Amendment*

The Tenth Amendment provides: "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. In this way, "the constitution divides authority between federal and state governments for the protection of individuals," and ensures that our system of federalism is maintained. *New York v. United States*, 505 U.S. 144, 181 (1992). Alabama contends that the DPPA violates the Tenth Amendment on two grounds. First, Alabama asserts that Congress exceeded its powers by passing the DPPA pursuant to the Commerce Clause. Second, the State argues that the DPPA imposes an unconstitutional obligation upon the State of Alabama to regulate the disclosure of personal DMV records.

In determining whether Congress violated the Tenth Amendment in enacting the DPPA, the court notes well that Congressional Acts are to be afforded great deference and are entitled to a strong presumption of constitutional validity. *See Flemming v. Nestor*, 363 U.S. 603, 617 (1960). "Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters v. National Ass'n of Radiation*

Survivors, 473 U.S. 305, 319 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotations omitted)). Hence, an Act of Congress will be invalidated only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1984).

A. *Congress's Authority to Pass the DPPA*

Where Congress validly exercises authority delegated to it under the Constitution, Congress does not violate the Tenth Amendment. *Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995) (citing *United States v. Lopez*, 459 F.2d 949, 951 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972)).[7] Defendants assert that the DPPA was valid exercise of Congress's authority, under the Commerce Clause, to regulate activities that affect interstate commerce. (Defs.' Mem. in Supp. at 17) (citing *United States v. Lopez*, 514 U.S. 549, 550 58-59 (1995).) The State, however, contends that Congress exceeded its Constitutional authority in legislating the State's release of public records, as such release is neither commerce nor an activity substantially affecting commerce. (Pls.' Br. in Supp. of Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dis. at 3.) The State further contends that Congress's attempt to regulate said release through its link to interstate commerce is too attenuated to pass muster under the Supreme Court's holding in *United States v. Lopez*, 514 U.S. 549, 550 (1995). (Pls.' Br. in Supp. of Mot. for Summ. J. at 7.)

Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce . . . among

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[7] Decisions of the Former Fifth Circuit filed prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

the several states." U.S. Const. art. I, § 8, cl. 3. Pursuant to this power, Congress may: (1) regulate channels of interstate commerce; (2) regulate instrumentalities of, or persons or things in, interstate commerce; and (3) regulate intrastate activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. Thus, a statute need not regulate economic activity directly in order to satisfy the requirements of the Commerce Clause. *USA v. Olin*, 107 F.3d 1506, 1509 (11th Cir. 1997) (citing *Lopez*, 514 U.S. at 558-59).

However, where Congress seeks to regulate activities arising out of or connected to a commercial transaction, such activities, viewed in the aggregate, must be found to "substantially affect[] interstate commerce." *Lopez*, 514 U.S. at 561. The statute "must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred." *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir. 1997) (quoting *United States v. Kenney*, 91 F.3d 884, 888 (7th Cir. 1996)), *vacated in part on r'hring*, 1998 WL 29636 (11th Cir. 1998). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 559.

The Eleventh Circuit has stated that *Lopez* does not require that Congress make formal legislative findings connecting the regulated activity to interstate commerce. *Wright*, 117 F.3d at 1269 (citing *Olin*, 107 F.3d at 1510). Rather, so long as Congress has a "rational basis" for concluding that a regulated activity sufficiently affects interstate commerce, its validity under the Commerce Clause is sound. *Id.* (citing *Lopez*, 514 U.S. at 557). Thus, the DPPA survives Commerce Clause scrutiny if the court finds that Congress had a

rational basis to conclude that the conduct regulated by the DPPA "arises out of or is connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce," so long as that connection is not too attenuated. *Wright*, 117 F.3d at 1270 (quoting *Lopez*, 514 U.S. at 561).

Defendants contend that Congress's passage of the DPPA was a valid exercise of its Commerce Clause powers, as Congress enacted the DPPA for the purpose of regulating "the buying and selling, or disclosing and receiving, of a commodity, personal information, in a national commercial market that trades in it." (Defs.' Mem. in Supp. at 19.) Defendants urge that Congress had a solid foundation for linking the DPPA to interstate commerce, as "States' release of personal DMV information into the national market for personal information clearly has a substantial effect on interstate commerce." (Defs.' Mem. in Supp. at 35 n. 33.) In support of this contention, Defendants cite testimony contained in the Congressional Record concerning the DPPA. For instance, in considering the DPPA, Congress heard testimony regarding the wide scope of nationwide trade in personal DMV information. (Defs.' Mem. in Supp. at 19 (citing 139 Cong. Rec. S15,764 (statement of Sen. Boxer); *id.* (statement of Sen. Warner); *id.* at S15,765 (statement of Sen. Robb); 140 Cong. Rec. H2,522 (Apr. 20, 1994) (statement of Rep. Moran); *id.* at H2,526 (statement of Rep. Goss)). This trade, in which more than half of the States are engaged, includes the sale of personal DMV records to businesses who use it in direct marketing nationwide. *Id.*

Plaintiffs challenge Defendants' characterization of the disclosure of information contained in the DMV

records as "commerce." Specifically, Plaintiffs argue that Alabama does not and never has trafficked in the commercial sale of public motor vehicle records. Rather, the State charges only a "nominal fee to cover administrative expenses related to the release of public writings." (Amend. Compl. ¶ 15.) Thus, Plaintiffs argue, the federal government's justification of the law as regulation of commercial activity in which states are "market participants" is "inapposite." (Pls.' Br. in Supp. of Mot. for Summ. J. at 7.) Any link between the State's public disclosure laws and interstate commerce, Plaintiffs argue, is attenuated at best. (Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dis. at 4.)

The court finds that Congress had a rational basis to conclude that States' disclosure of personal DMV records has a substantial, apparent, effect on interstate commerce sufficient to withstand scrutiny under the Tenth Amendment. *See Wright*, 117 F.3d at 1270. Even viewing the record before the court in a light most favorable to the State, it is nevertheless apparent that Congress, in considering the DPPA, heard testimony revealing that, once released, personal DMV information is often used in direct marketing campaigns or resold by database-compiling companies to other companies for use in direct- marketing campaigns. (*See* Statement of Dr. Mary J. Culnan, 1994 WL 14168083, attached as Ex. 5 to Pls.' Mem. in Supp.) Furthermore, Congress learned that direct marketing is a "national" industry, as list compilers serve customers a "national audience" of customers. (*See id.*) Thus, whether Alabama receives a profit from the disclosure of personal DMV information, or otherwise "traffic[s] in the commercial sale" of personal DMV information is irrelevant. Rather, Congress concluded that the very fact

that such information is disclosed substantially impacts the national trade of DMV records. Hence, regulation of all States' disclosure of personal DMV records is necessary for the regulation of the interstate trade of such records. Accordingly, the court finds that Congress had an apparent and rational basis for finding that the regulation of States' disclosure of personal DMV records has a substantial effect on interstate trade. As the court need not pile "inference upon inference" in order to reach this conclusion, the Act falls within the scope of Congress's authority pursuant to the Commerce Clause. *See Lopez*, 514 U.S. at 559, 566.[8]

B. *The DPPA Does Not Compel the State to Regulate*

Congress's power under the Commerce Clause to regulate activities substantially affecting interstate commerce authorizes Congress to regulate state activities, as well. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (upholding federal statute requiring states to pay their employees according to minimum wage and overtime standards). However, this authority is limited; Congress may not compel states or state officers to regulate. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997); *New York v. United*

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[8] Defendants also note that Congress passed the DPPA pursuant to its powers under Section 5 of the Fourteenth Amendment, based on its finding that state DMVs were violating the constitutional right of privacy of stalking victims by releasing their home addresses and phone numbers through DMV records. (Defs.' Mem. in Supp. at 25 n. 25 (citing 139 Cong. Rec. S15763 (Statement of Sen. Boxer)).) Because the court finds that the DPPA is a valid exercise of Congress's power under the Commerce Clause, it need not reach the question of whether the Fourteenth Amendment also provided authorization for the DPPA. *See Cheffer v. Reno*, 55 F.3d 1517, 1519, 1521 n. 7 (11th Cir. 1995).

States, 505 U.S. 144, 175-76 (1992). In its Motion for Summary Judgment, Alabama asserts that the DPPA exceeds Congress's authority to regulate the States, as the statute is an unconstitutional federal directive requiring the State of Alabama to administer a federal program.

In essence, the State argues, rather than regulate the commercial users of the information contained in the DMV records, the DPPA commands the States to regulate the users of the information. (Pls.' Br. in Supp. of Mot. for Summ. J. at 7.) Alabama contends that the DPPA "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176. In particular, the State argues, because only States title and register motor vehicles and license individuals to drive on public roads, only States can authorize the initial release of the information collected therein. (Pls.' Br. in Supp. of Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dis. at 6.) Thus, Alabama argues, the DPPA is an attempt by Congress to require that States regulate their own activity, namely the release of DMV records. (*Id.*) In order for States to come into compliance with the regulations issued by the DPPA, they must, in fact, develop and enforce new regulatory schemes to meet the federal goals articulated in the Act. (*Id.*) This violates the Tenth Amendment, Plaintiffs argue, as "Congress insulates itself from accountability to the citizenry by shifting the apparent blame for any problems to the State actors implementing the Act on Congress's behalf." (*Id.*) As basis for this argument, the State relies heavily on *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997).

In *New York v. United States*, the Supreme Court addressed the constitutionality of the "take title" provision of the federal Low-Level Radioactive Waste Policy Act, which required States to chose between accepting ownership of waste generated within their borders and regulating according to instructions of Congress. *New York*, 505 U.S. at 152. The Court held that the provision violated the Tenth Amendment, as both "choices" given the States were "unconstitutionally coercive regulatory techniques." *Id.* at 176. The Court found that this provision "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," in violation of the powers given Congress under the Constitution *Id.* at 176. In sum, the Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188.

> [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts. The allocation of power in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly, it does not authorize Congress to regulate state government's regulation of interstate commerce.

New York, 505 U.S. at 166.

In *Printz v. United States*, the Court expanded its holding in *New York*. There, the Court held unconstitutional provisions of the Brady Handgun Violence Prevention Act imposing interim requirements on State chief law enforcement officers ("CLEOs") to conduct background checks on prospective handgun purchasers

and to perform related tasks. *Printz*, 117 S. Ct. at 2368. Specifically, the Act required that CLEOs:

> make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a firearm by a particular purchaser] would be in violation of the law, including research in whatever state and local recordkeeping systems are available.

Printz, 117 S. Ct. at 2369 (quoting 18 U.S.C. § 922(s)(2)). The Court characterized this provision as one directing or forcing state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. *Printz*, 117 S. Ct. at 2369, 2376. The Court held that such a requirement violated the Constitution, because:

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz, 117 S. Ct. at 2384.

A basic principle upon which the Supreme Court rests its holdings in *New York* and *Printz* is the allocation of accountability between States and the federal government. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their

constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Printz*, 117 S. Ct. at 2382.

In characterizing the DPPA as "a federal mandate that requires the State of Alabama to design, implement and enforce administrative procedures regulating its release and its citizens' access to and use of motor vehicle records," the State analogizes the DPPA to the act at issue in *Printz*. (Pls.' Br. in Supp. of Mot. for Summ. J. at 10.) "Much like the portion of the 'Brady Bill' which commandeered participation of State law enforcement, the DPPA mandates 'the forced participation of the States' executive in the actual administration of a federal program'" by prohibiting States from releasing privacy related records, except in accordance with a federal plan. (Pls.' Br. in Supp. of Mot. for Summ. J. at 8, 9 (quoting *Printz*, 117 S. Ct. at 2376).)

Defendants contend that Alabama's argument misconstrues both the DPPA and Tenth Amendment jurisprudence, and urge the court to critically evaluate Plaintiffs' representation of the DPPA, and that of the other District Courts which have addressed its constitutionality.[9] According to Defendants, rather than directing States to regulate, the DPPA directly regulates state activities that substantially affect interstate commerce, as the DPPA neither directs the States or

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[9] Both the district court of South Carolina and the district court of Oklahoma have found that the DPPA, like the provision at issue in *Printz*, violates the Tenth Amendment. *Condon v. Reno*, 972 F.Supp. at 986; *Oklahoma v. United States*, No. 97-1423-R 1358 (W.D. Okl. Sept. 17, 1997).

their officials to regulate their citizens, nor to construct any regulatory regime. (Defs.' Mem. in Supp. at 16.)

Defendants analogize the DPPA to other constitutional regulations the federal government imposes directly on the States. (Defs.' Mem. in Supp. at 18-19) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (allowing federal legislation requiring States to pay their employees according to federal minimum wage and overtime standards); *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983) (allowing federal regulation ordering States not to discriminate against their employees on the basis of age).) Defendants argue that, like these constitutional statutes, "the DPPA simply regulates a realm of national economic activity—here, the buying and selling, or disclosing and receiving, of a commodity, personal information, in a national commercial market that trades in it—whether or not the economic actors happen to be States or citizens." (Defs.' Mem. in Supp. at 19.)

Defendants distinguish the statute at issue here from those found unconstitutional in *New York* and *Printz*. In this statute, unlike those at issue in *New York* and *Printz*, "Congress has set forth a comprehensive scheme directly regulating individuals' disclosure and states' disclosures of personal information. It has not enlisted the States to do either job for it." (Defs.' Mem. in Supp. at 25.) Defendants argue that "the DPPA directs neither states or their officials to regulate individuals' behavior for it, nor compels States to craft new administrative or legislative schemes designed to regulate the state's own activities." (Defs.' Mem. in Supp. at 23.)

Specifically, Defendants argue, the DPPA does not "call upon states or state officials to legislate pursuant

to congressional direction," nor does the DPPA "conscript state officers to help the federal government search for potential violations of federal law." (Defs.' Mem. in Supp. at 23.) The DPPA does not require that State officials report or arrest violators of the Act; nor does it require States to ensure that state citizens not use, sell or otherwise violate the Act. (Defs.' Mem. in Supp. at 24.) Rather, Defendants argue, the DPPA "directly regulates individuals' use of that information." (Defs.' Mem. at 24.) Further, Defendants argue, the DPPA does not impermissibly compel States to pass laws or invent administrative schemes to govern their own activities; Congress itself has articulated a federal regulatory scheme to directly regulate the state activities by setting forth restrictions on disclosure of personal DMV information by States and private individuals. (Defs.' Mem. in Supp. at 24-25.) In sum, Defendants argue, the DPPA requires no regulatory or enforcement action on the part of the State or state officials. (Defs.' Mem. at 25.)

The court agrees with Defendants' characterization of the DPPA and finds that the DPPA is not the type federal legislation prohibited by *New York* and *Printz*. Rather, the court finds that the DPPA is analogous to the statute found constitutional in *South Carolina v. Baker*, 485 U.S. 505 (1988). There, the Court upheld the constitutionality of an Internal Revenue Code provision denying federal income tax exemptions for interest earned on state issued unregistered ("bearer") bonds, specifically rejecting South Carolina's argument that the provision violated the Tenth Amendment. *Id.* at 515. In reaching its holding, the Court analyzed the provision as if it directly regulated the States by prohibiting outright the issuance of bearer bonds. *Id.*

at 511. As in the instant case, the State in *South Carolina v. Baker* argued that the prohibition "commandeers the state legislative and administrative process by coercing States into enacting legislation" and administrating a scheme to comply with the federal provision. *Id.* at 513.

The Court held, however, that the provision at issue in *South Carolina v. Baker* regulates state activities—specifically the issuance of non-registered bonds—rather than the manner in which States regulate private parties. *Id.* at 514. The Court rejected the State's argument that the provision, though regulating the state, nevertheless commandeers the State legislative and administrative process because the State's legislature had to amend numerous statutes to comply with the federal provision, and because state officials would be required to "devote substantial effort to determine how best to implement" the system required by the federal provision. *Id.* at 514. The Court stated:

> Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

South Carolina, 485 U.S. at 514-15. The Court further stated that "Congress could constitutionally impose federal requirements on States that States could meet only by amending their statutes." *South Carolina*, 485 U.S. at 515. *See also Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 (1982) ("*FERC*") ("[T]here are instances where the Court has

upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.").

The court finds that the DPPA, like the statute at issue in *South Carolina v. Baker*, is one which directly regulates the states, rather than requires the states to administer or enforce a federal regulation. This distinguishes the DPPA from the provisions at issue in *New York* and *Printz*—both of which the Court found required States to regulate certain activity according to the instructions of Congress. *New York*, 505 U.S. at 175; *Printz*, 117 S. Ct. at 2383. As Defendants note, the DPPA neither asks State officials to arrest or report violators of the DPPA, nor does it require States to ensure that state citizens do not use, sell or otherwise re-disclose personal DMV information. Unlike the provision at issue in *Printz*, the DPPA requires no affirmative action by the State or its officers. *See Printz*, 117 S. Ct. at 2369.

Rather, the DPPA merely prohibits States from disclosing personal DMV records for any impermissible purpose; the DPPA itself directly regulates individuals' use of such information by governing how authorized individuals may resell or re-disclose personal DMV information, making it unlawful for persons to knowingly obtain or disclose personal DMV information for an improper use, and making it unlawful for persons to make false representations to obtain personal DMV records. 18 U.S.C. §§ 2721(c); 2722(a) and (b). The Act provides for fines against individuals who knowingly violate the Act, 18 U.S.C. § 2723(a), as well as authorizes civil actions against individuals who knowingly obtain, disclose or use personal information from a motor vehicle record for an improper use. 18 U.S.C.

§ 2724. As Defendants state, nothing in the DPPA requires that States or State officials legislate solutions to solve the federally-identified problem of improper disclosure of personal records contained in DMV records. Rather, the DPPA sets forth a bar on the dissemination of information except as provided in the DPPA by both the State and private individuals. Thus, as in *South Carolina v. Baker*, Congress has simply enacted a prohibition on certain State activity.

Alabama may, indeed, incur some administrative and personnel costs associated with compliance with the Act. (*See* Hagan Aff.) However, the DPPA does not mandate that Alabama enact any specific legislation or regulation; nor does the Act require that the State take any specific action in furtherance of a federal goal.[10] The fact that the State may have to "take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *South Carolina*, 485 U.S. at 514-15.[11]

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[10] The court notes that the DPPA allows States to establish waiver procedures to handle requests for disclosures that do not fall within one of the Act's exceptions, 28 U.S.C. § 2721(d), as well as allows States to release personal information for certain purposes, so long as they establish a way for individuals to prohibit such disclosure. 28 U.S.C. § 2721(b)(11), (12). However, these provisions are permissive, rather than mandatory. Thus, despite the fact that States may establish waiver and "opt out" provisions in order to disclose information for otherwise impermissible purposes, they are not required to do so.

[11] In so finding, the court respectfully disagrees with both the South Carolina and Oklahoma district courts' findings that the DPPA requires States to regulate their citizens' access to and use of personal DMV records. *Condon*, 972 F.Supp. at 986 (finding

This court is keenly aware of the Supreme Court's trend, indicated by *New York* and *Printz*, of invalidating federal legislation on grounds that it "commandeers" state legislative and administrative processes. Yet, despite these recent holdings prohibiting Congress from compelling the States to enact or administer federal regulatory programs, *South Carolina v. Baker* is still good law. The Court has yet to hold that, where a federal regulation merely demands State compliance, necessitating the State take administrative or even legislative action to achieve such compliance, such regulation amounts to impermissible "commandeering" of the State's legislative or administrative process. Because the court finds that the DPPA falls within the scope of *South Carolina v. Baker*, rather than *New York* and *Printz*, the court must also find that the DPPA presents no constitutional defect.

Judicial self-restraint mandates the duty of the court to follow controlling precedent, like it or not. While the law may well be changed by the Eleventh Circuit or the Supreme Court, trial courts do not make law—indeed do not even dictate "holdings"—but instead find facts and apply the existing law. Accordingly, it is not within the province of this district court to expand the Court's holdings in *New York* or *Printz* to encompass the present instance. Rather, the court is obligated to follow precedent. The Supreme Court has recently reaffirmed the principle that "if a precedent of [The Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [district court] should follow the case

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that the DPPA violates the Tenth Amendment); *Oklahoma v. United States*, No. 97-1423-R (W.D. Okl. Sept. 17, 1997) (same).

which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Hence, the court finds it is bound by the Supreme Court's holding *South Carolina v. Baker*. The DPPA does not violate the Tenth Amendment, as it is a direct prohibition on the State from releasing personal DMV records for impermissible purposes, rather than a regulation requiring the State to enforce the federal government's ban on personal DMV disclosures. While the court is keenly aware of the way in which "forcing state governments to absorb the financial burden of implementing a federal regulatory program" threatens the balance of our system of federalism, *Printz*, 117 S. Ct. at 2382, any costs incurred by the State, or actions that the State must take as it attempts to come into compliance with the DPPA, do not amount to the "commandeering" found impermissible in *New York* and *Printz*. *See South Carolina*, 485 U.S. at 514-15.[12] Based on the foregoing, the court finds that the DPPA does not violate the Tenth Amendment.

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[12] The court notes well that the Tenth Amendment serves to prohibit Congress from easily "tak[ing] credit for 'solving' problems without . . . ask[ing] their constituents to pay for the solutions with higher federal taxes," thereby "forcing state governments to absorb the financial burden of implementing a federal regulatory program." *Printz*, 117 S. Ct. at 2382. Had the court found that the DPPA presented such a situation, the court would not have hesitated to find the Act constitutionally infirm. However, as discussed *infra*, the court finds that the DPPA does not pass along to the States the cost of implementing a federal regulatory program.

III. *Eleventh Amendment*

Alabama would also urge the court to find that the DPPA violates the Eleventh Amendment to the United States Constitution. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Plaintiffs argue that two provisions within the DPPA violate the Eleventh Amendment. First, § 2723(b) of the Act provides for a $5,000 a day civil penalty against the state for noncompliance. It states:

> Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

18 U.S.C. § 2723(b).

In addition, the Act provides for a civil damages remedy against a person who knowingly discloses personal information from a motor vehicle record. 18 U.S.C. § 2724(a) provides:

> A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter, shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

18 U.S.C. § 2724(a).

The Act further provides that, pursuant to this civil action remedy, the court may award actual damages of not less than liquidated damages in the amount of $2,500, punitive damages upon proof of willful or reckless disregard of the law, reasonable attorneys fees and costs, as well as other equitable relief. 18 U.S.C. § 2724(b).

Plaintiffs argue that these provisions violate the Eleventh Amendment because they allow for suits against state employees and agents. Plaintiffs cite *Seminole Tribe of Florida v. Florida*, 517 U.S. 609 (1996), for the proposition that the Commerce Clause does not grant Congress the power to abrogate the States' sovereign immunity. Thus, absent a waiver by the State, Congress may not authorize suit against the state.

"[T]he Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). However, "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31. Thus, where a statute authorizes suit against state employees personally, the Eleventh Amendment erects no bar. *See Hafer*, 502 U.S. at 31; *Cross v. State of Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995).

The court finds that the DPPA does not authorize suits by private individuals against the State. The definitional section of the DPPA clearly indicates that any suits authorized by the DPPA against "any person" knowingly disclosing personal information from a motor

vehicle record in violation of the DPPA excludes suits against the State or State agencies. Specifically, 18 U.S.C. § 2725(2) states:

> "person" means an individual, organization or entity, but does not include a State or agency thereof.

18 U.S.C. § 2725(2). Hence, by its own terms, the Act authorizes private suits against individuals, yet precludes such suits against the state.[13]

Plaintiffs would have the court find that § 2725(1)'s definition of "person" is irrelevant for purposes of Eleventh Amendment analysis. Plaintiffs state that, because "the primary 'disclosures' of information defined by the DPPA are state DMV employees, 18 U.S.C. § 2724(a) clearly exposes state employees to suit and thus effectively authorizes damage suits against the states." (Pls.' Br. in Supp. of Pls.' Mot. for Summ. J. at 10-11.) Alabama argues that to interpret "persons" not to include State actors but to expose State workers to personal financial liability for following the instructions of their superiors would render the statute meaningless. (Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dis. at 7.) Alabama states

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[13] By authorizing private suits for civil damages against "persons," but defining "person" to exclude the State or any State agency, the DPPA precludes such suits against individuals in their "official capacity." It is well-settled that a suit for monetary relief against a state officer in his or her official capacity is deemed a suit against the state. *See e.g. Cross v. State of Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995) (citing *Lassiter v. Alabama A&M University*, 3 F.3d 1482, 1485 (11th Cir. 1993)). Further, the statute in no way precludes individuals from asserting the defense of "qualified immunity." *See Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997).

that, because only State employees have access and ability to make an initial release of personal DMV information, suits against State employees for following State law and procedure (presumably in accordance with Alabama's Open Records Act) as relates to the DPPA "must necessarily be a claim against the State and therefore subject to Eleventh amendment immunity." (Pls.' Resp. to Order to Show Cause and Defs.' Mot. to Dismiss at 7.) Plaintiffs further argue that, should the court accept Defendants' interpretation of the statute, personal immunity defenses allowed for state employees would render the statute meaningless as well. (*Id.* at 8.)

Although the State would have the court find that such a reading of the statute renders it "meaningless," such a reading is the statute's "plain meaning." Thus, the court construes the State's argument as an invitation for the court to interpret the statute as authorizing suit against state employees in their official capacity, despite the statute's express words to the contrary. The court respectfully declines the State's invitation to interpret the DPPA contrary to its clear meaning. Rather, the court is mindful of its duty to respect the enactments of a legislative body.

It is a maxim of statutory construction that a court must give plain meaning to a statute where such meaning is patent. "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1821)). Furthermore, "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in

question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson*, 285 U.S. 22, 62 [(1932)]." *Concrete Pipe & Products of Cal. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 628 (1993) (quoting *Machinists v. Street*, 367 U.S. 740, 749-750 (1961)).

The State further argues that Congress is precluded by the Eleventh Amendment from authorizing suit against the State by the United States. Accordingly, the State argues, § 2723(b), authorizing the Attorney General to impose a civil penalty against the State, is unconstitutional. The court finds that this argument is patently frivolous. The Supreme Court has refused to apply the Eleventh Amendment to bar federal court suits by the United States government against a state. Rather, the Court has explicitly stated, "the Federal Government can bring suit in federal court against a State." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1131 n. 14 (1996). *See also United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 641-47 (1892). Contrary to the State's contention, it is irrelevant which Constitutional provision authorizes the statute in question. Again, the court respectfully declines to override over one hundred years of Supreme Court precedent to find that the Eleventh Amendment precludes Congress from authorizing the United States to bring a suit against a State. The court takes very seriously its oath and obligation to uphold the supreme law of the land and would neither be presumptuous enough nor "activist" enough to deem that it, as a district court, has the authority to make

new law. Accordingly, the court finds that the DPPA does not violate the Eleventh Amendment to the United States Constitution.

ORDER

Based on the foregoing, the following is hereby CONSIDERED and ORDERED:

(1) Plaintiffs' Motion for Summary Judgment be and the same is hereby DENIED;
(2) Defendants' Motion to Dismiss, construed by the court as a Motion for Summary Judgment, be and the same is hereby GRANTED;
(3) Plaintiffs' Motion for a Preliminary Injunction be and the same is hereby DENIED as moot; and
(4) All costs herein incurred be and the same are hereby taxed against Plaintiff, for which let execution issue.

Done this the *13th* day of March, 1998.

/s/ IRA DE MENT
IRA DE MENT
UNITED STATES
DISTRICT JUDGE

APPENDIX C

The Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), provides:

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) IN GENERAL.—Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) PERMISSIBLE USES.—Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal

information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has

implemented methods and procedures to ensure that—

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing, and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) RESALE OR REDISCLOSURE.—An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b) (11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b) (11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the

information will be used and must make such records available to the motor vehicle department upon request.

(d) WAIVER PROCEDURES.—A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

§ 2722. Additional unlawful acts

(a) PROCUREMENT FOR UNLAWFUL PURPOSE.—It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) FALSE REPRESENTATION.—It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

§ 2723. Penalties

(a) CRIMINAL FINE.—A person who knowingly violates this chapter shall be fined under this title.

(b) VIOLATIONS BY STATE DEPARTMENT OF MOTOR VEHICLES.—Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a

civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

§ 2724. Civil action

(a) CAUSE OF ACTION.—A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) REMEDIES.—The court may award—

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

§ 2725. Definitions

In this chapter—

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof; and

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

Supreme Court, U.S.
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No. 99-61

In The

Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

BILL PRYOR, ATTORNEY GENERAL FOR THE STATE OF ALABAMA, AND THE STATE OF ALABAMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM FOR RESPONDENTS BILL PRYOR AND THE STATE OF ALABAMA

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§2721-2725, violates the Tenth Amendment.

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MEMORANDUM FOR RESPONDENTS BILL PRYOR AND THE STATE OF ALABAMA

Bill Pryor and the State of Alabama do not oppose the granting of the writ of certiorari in this case. Contrary to the Solicitor General's suggestion that this case be held pending the disposition of *Reno v. Condon*, Pet. at 11, however, they respectfully suggest that certiorari be granted and that this case be consolidated with *Reno v. Condon*, cert. granted, No. 98-1464 (May 17, 1999). As with *Reno v. Condon*, this case involves a challenge to the constitutionality of the Driver's Privacy Protection Act of 1994 ("DPPA" or the "Act"), 18 U.S.C. §§2721-2725 (1994 & Supp. III 1997). The United States Court of Appeals for the Eleventh Circuit held that DPPA is unconstitutional because it requires state officials to administer a federal program and thereby violates the Tenth Amendment. *Pryor v. Reno*, Pet. App.1a-16a. Consolidation is appropriate because Alabama practice pre-DPPA, as well as that of most of the other States, differed from that of South Carolina, and that difference highlights important State interests.

Notwithstanding their belief that certiorari is appropriate, Respondents submit this Memorandum for two reasons. First, Respondents will clarify the purposes and effect of the Act and identify its impact on the State of Alabama. As noted, Alabama's information disclosure practices differ from those of South Carolina, and those differing state policies warrant review of this case instead of disposition based solely on *Reno v. Condon*. Second,

Respondents will briefly show that DPPA is unconstitutional when tested against this Court's Tenth Amendment jurisprudence.

COUNTERSTATEMENT OF THE CASE

In this action, the State of Alabama and its Attorney General challenged the constitutionality of the DPPA. The District Court construed the Government's Motion to Dismiss as a Motion for Summary Judgment and granted it. Pet. App. 17a-51a. On appeal, the Eleventh Circuit reversed the District Court's ruling and remanded for entry of an injunction prohibiting enforcement of the DPPA. Pet. App. 1a-16a.

Under Alabama law, all records kept in the course of executing the duties of public office are public writings subject to the general laws of public records. Driver's license records are no exception. Section 32-6-14 of the Code of Alabama requires the Director of the Alabama Department of Public Safety to index and maintain a record of every license application that his office receives. Section 32-7-4 of the Code of Alabama requires the Director to release abstracts of the operating record of any person subject to that chapter. The effect is to make motor vehicle registration information a public record under Section 36-12-40 of the Code of Alabama.

The Alabama Department of Public Safety discloses driver registration information for a $5.75 administrative fee. ALA. CODE §32-7-4 (1989). It does not traffic in the commercial sale of public motor vehicle registration

information. Any commercial activity involving such information is only incidental to its release.

DPPA changes this public records practice. It directly commands the States, including Alabama, not to disclose state motor vehicle and driver's license records except as provided in the Act. 18 U.S.C. §2721(a). The Act makes it unlawful for a State licensing agency and its officers, employees, and contractors knowingly to disclose or otherwise make available personal information for any purpose other than a permissible use. 18 U.S.C. §2721(b). It threatens criminal and civil liability for noncompliance, including a civil penalty for States whose licensing agencies have a policy or practice of substantial noncompliance and civil liability for persons who disclose protected information. 18 U.S.C. §§2723, 2723(b), 2724(a), 2724(b).

The Act goes on to recognize that there are many legitimate governmental and public purposes that support disclosure of this information. It provides for those purposes through a series of mandatory disclosures and a second series of permissive disclosures. 18 U.S.C. §§2721(b), 2721(b)(1)-(14). The Eleventh Circuit described the circumstances of disclosure as "abundant." *Pryor v. Reno*, Pet. App. at 3a.

The Solicitor General asserts that Congress enacted DPPA "[b]ased on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records." Pet at 5. Some of the points it makes regarding the legislative history require clarification. First, the Government references the murder of actress Rebecca Schaeffer by a stalker who purportedly

obtained her home address through her state motor vehicle records. The same legislative history shows, however, that the stalker obtained that information from a licensed private investigator. Ironically, in DPPA, Congress permits disclosure to licensed private investigative agencies or security services. 18 U.S.C. §2721(b)(8). Now, under DPPA, a stalker need only provide a pretextual reason to a private investigator in order to obtain access to personal information in motor vehicle records.

In addition, Congress passed federal anti-stalking legislation that addresses this problem directly. See 18 U.S.C. §2261A. This legislation duplicates the anti-stalking legislation passed by many of the States. See, e.g., ALA. CODE §§13A-6-90 to 13A-6-94 (Supp. 1993); see also James L. Hankins, Comment, *Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon*, 46 Okla. L. Rev. 109, 125 and n.77 (1993) (collecting citations).

REASONS FOR GRANTING THE WRIT

As this Court recognized in granting certiorari in *Reno v. Condon*, challenges to the constitutionality of DPPA have produced a division among the circuits and raised issues of national importance. While those factors are present in this case, another element warrants review of this case. Alabama's open records practice is representative of the laws of a large majority of States before those state laws were changed in response to DPPA; South Carolina's law regarding disclosure of information from motor vehicle records represents a minority (if not

unique) setting. The laws of Alabama and the other States following the majority approach reflected important policy decisions not directly presented in South Carolina's challenge to DPPA.

The States that had open records practices pre-DPPA promoted a variety of public interests. First, from the point of view of States as autonomous governmental entities, open records policies serve the interest of exposing government operations to public view and, thereby, disciplining those operations through the political process so as to ensure public confidence in the democratic system. There were other benefits, as well. Professor Odom and Mr. Feder explain:

> State and local governments benefit from the availability of this data to many citizen groups. Private citizens in Madison, Wisconsin, used motor vehicle records to identify men searching for prostitutes in order to send the men letters to discourage their patronage. Other citizens used this technique to discourage street-corner drug sales. Until thwarted by the DPPA, a Regional Ozone Coalition planned to use motor vehicle records to identify owners of polluting cars in Ohio and Kentucky to encourage them to clean up their exhaust. Mothers Against Drunk Driving ("MADD") chapters have used information from motor vehicle records to protect children from alcohol abusers. Advocacy groups for the handicapped use the records to discourage illegal parking in parking spaces reserved for the handicapped.

Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism*, 53

Miami L. Rev. 71, 109 (1998) (footnotes omitted). They also report that the Detroit News used motor vehicle records to determine whether four State legislators lived in the districts that they represented. *Id.* at 110-11 (footnote omitted).

Under the classic view of federalism, the States are entitled to weigh the competing interests and strike a balance between the benefits of openness and those of privacy. These federalism interests are protected by the Tenth Amendment.

Although the Solicitor General presents a question that is so broadly phrased as to suggest potential challenges to the Eleventh Circuit's ruling under several constitutional provisions, the Petition presents only a Tenth Amendment argument Neither this Petition nor the Petition in *Reno v. Condon* seeks to justify DPPA as an exercise of Congress' power under Section 5 of the Fourteenth Amendment. Cf., *Reno v. Condon,* Reply Memorandum for the Petitioners, at 2 ("The government does not rely in this court on Section 5 of the Fourteenth Amendment as a basis for the DPPA . . . "). Likewise, although the Petition asserts various connections between DPPA and Congress' Commerce Clause powers, those assertions are inapposite. Legislation based on the Commerce Clause is subject to federalism restraints, including those imposed by the Tenth Amendment. The Commerce Clause provides only dubious support because Congress exempted virtually all interstate commerce connections from the Act. As the Eleventh Circuit noted:

> In trying to protect legitimate governmental and business uses of [motor vehicle] information . . . , Congress riddled the Act with more

> holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act.

Moreover, a statute that violates the Tenth Amendment cannot be saved by pointing out a Commerce Clause basis for it. DPPA violates the Tenth Amendment because it requires state officers to administer a federal program. In both *New York v. United States* and *Printz v. United States*, this Court held that Congress lacked the power to direct the States to "administer or enforce" a federal regulatory program. See *Printz*, 117 S. Ct. 2365, 2383 (1997); *New York*, 506 U.S. 144, 188 (1992). Yet, that is precisely what DPPA does.

The Act directs State motor vehicle authorities under what circumstances they must, may, and may not comply with a request for information. First, the State officer must determine whether the information sought is "personal information" within the meaning of DPPA. If "personal information" is sought, the State official must determine whether the information fits within the mandatory disclosure provisions in the "flush" language in 18 U.S.C. §2721(b). If the information is not subject to mandatory disclosure, the State official must determine whether the requested information fits within one or more of the enumerated permissive disclosures, see 18 U.S.C. §§2721(b)(1)-(b)(14), or whether disclosure is prohibited. The effect is to shift the burden of political accountability from the federal government, which issued the directive, to state officials, who must decide how the Act is to be applied to specific requests for information. See *Pryor v. Reno*, Pet. App. at 10a ("In reviewing requests

and interpreting the rules, state officers will be acting as federal agents making federal policy.").

This Court's precedents do not permit Congress to shift political accountability in this manner. Under the Commerce Clause, Congress is empowered to enact laws of general applicability that apply to States only incidentally. Such laws of general applicability impose similar burdens on the federal government and the private sector. In *South Carolina v. Baker*, 485 U.S. 505 (1988), for example, this Court held that Congress did not exceed its powers when it required States as well as the federal government and private citizens to issue bonds in registered form.

In contrast, DPPA cannot be considered a law of general applicability. DPPA targets the States for unique burdens while leaving unregulated most federal agencies and private sector operators (e.g., direct mailers) that maintain databases that contain similar "personal information" on individuals. Only States license drivers, and only States maintain databases of licensing information. As in *Printz*, any suggestion that the Act could be extended to private citizens "posits the impossible." 117 S. Ct. at 2383 n.17.

Instead of legislatively requiring the States to administer a federal program in violation of the Tenth Amendment, Congress could have enacted its policy in ways that do not run afoul of the Constitution. Congress could have used the appropriation process and its Spending Clause powers to give additional funding to States that administer their records in accordance with federal policy. Such an exercise of Congress' Spending Clause power would,

of course, have to comply with *South Dakota v. Dole*, 483 U.S. 203 (1987). Alternatively, Congress could have preempted the field, taking over the entire process of licensing drivers and registering motor vehicles. Finally, Congress could enact a generally applicable law of information privacy that applied only incidentally to States and State records. In doing so, Congress would have to act consistently, something that its present information privacy laws fail to do. Although the Solicitor General contends that different contexts require different approaches, he fails to explain why, on the one hand, names, addresses, and Social Security numbers should be available from credit reporting agencies subject to the Fair Credit Reporting Act, but, on the other hand, dissemination of the same information from motor vehicle records is criminalized. See Odom & Feder, *supra*, at 94. Likewise, the Solicitor General fails to explain why names, addresses, and medical information, linked to displayed registration numbers on aircraft, should be available from the Federal Aviation Administration. See *Condon v. Reno*, 155 F.3d 453, 465 n. 9 (4th Cir. 1998).

Finally, certiorari is appropriate because there is a split in the Circuits. The Fourth and Eleventh Circuits have declared DPPA unconstitutional. *Condon v. Reno; Pryor v. Reno*. The Seventh and Tenth Circuits have upheld the Act against constitutional challenge. *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir.1998). This Court should proceed to resolve that split by declaring DPPA unconstitutional.

CONCLUSION

For the foregoing reasons, Respondents agree that the Petition should be granted, but submit that the issue raised in the Petition should be limited to whether DPPA violates the Tenth Amendment, and that this case should be consolidated with *Reno v. Condon*.

Respectfully Submitted,

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